STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2000
v	No. 214941 Livingston Circuit Court
WILLIAM COLE GRANT, Defendant-Appellant.	LC No. 97-010185-FC

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant William Cole Grant was convicted in a jury trial of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant appeals as of right. We remand for a *Ginther*[1] hearing.

Shortly after his conviction, defendant moved for a new trial on the basis of newly discovered evidence. The trial court held an evidentiary hearing on defendant's motion during which several witnesses offered testimony in support of defendant's trial theory that the cause of vaginal injuries suffered by one of the girls was a bicycle accident and not, as alleged by the prosecution, a sexual assault by defendant. During the hearing, one witness also sought to impeach the testimony of the physician who initially examined the girl regarding these injuries, and another offered evidence in support of an alibi, a defense not presented at trial. At the conclusion of the hearing, the trial court denied defendant's motion. On appeal, defendant argues that in doing so the trial court abused its discretion. We disagree.

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). To justify a new trial on the basis of newly discovered evidence, the defendant must establish that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *Id.*; *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). The appellant

has the burden of showing that the evidence is both newly discovered and material. *People v Williams*, 118 Mich App 266, 271; 324 NW2d 599 (1982). Here, defendant failed to meet this burden.

Defendant challenges only the court's conclusion that the testimony of Christopher and Daniel Merrow did not justify a new trial. Their testimony went to a bicycle accident that occurred shortly before Lucy Guido, the victim in the CSC I case, went to the hospital. The court referred to the testimony as "cumulative because the question of accident was something that was suggested to the jury." In fact, the jury had heard testimony from two sources that Lucy had sustained injuries in a bicycle accident around the time of the alleged assault. In addition, the jury heard the defense theory that the bicycle accident had been the source of the vaginal tearing suffered by the victim. However, the testimony did not come from witnesses to the accident. The Merrow brothers were present at the scene of the accident and testified that there was a tear in the crotch of the victim's pants after the accident. Their testimony could have transformed a defense theory without any substantiation to a theory supported by observation of eyewitnesses. This testimony was not corroborative; it would have materially changed the quality, as opposed to the quantity, of the evidence supporting defendant's theory. See *People v LoPresto*, 9 Mich App 318, 325; 156 NW2d 586 (1967) (affidavit of three persons who did not testify at trial that supported defendant's claim of self-defense not cumulative when facts contained in affidavit were not testified to in detail by any witnesses in case). We decline under these circumstances to accept the court's characterization of the testimony of the Merrows as cumulative.

However, even if we consider the Merrow brothers' testimony to be newly discovered and not cumulative, such evidence was readily discoverable by defendant and could have been produced at trial with reasonable diligence. The Merrows were not people unknown to defendant. They were members of his girlfriend's family who he was aware were present on the day the child was injured at her grandfather's home. Testimony offered by defense witnesses at trial and at the motion hearing established that defendant was present at the home the day the child suffered injury to her groin. We cannot conclude that the trial court's decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). No abuse of discretion is shown.

Next, defendant argues that he was denied effective assistance of counsel as a result of numerous failings by his trial counsel. Defendant failed to preserve this issue by moving below for a *Ginther* hearing, *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 2d 667 (1996). Defendant moved that this Court remand the case to the lower court so that a record in support of his claims of ineffective assistance of counsel could be made. See MCR 7.211(C)(1)(a)(ii). Because defendant failed to support that request with an offer of proof sufficient to demonstrate the necessity of remand, we denied defendant's motion. Upon further review of the facts before this Court, however, we conclude that a remand is necessary.

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v Washington*¸ 466 US 668, 690, 694; 104

S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant makes two alternative arguments on his claim of ineffectiveness: (1) the record before this Court establishes that he was denied effective assistance of counsel; and (2) even if the record is insufficient to conclusively support his claim of ineffectiveness, he is entitled to a hearing in the trial court on his claim of ineffectiveness. While we disagree that, under the current state of the record, defendant has shown that counsel was ineffective, we agree that defendant has now made a sufficient showing to call for a hearing in the trial court so he can develop a record on his claim of ineffectiveness.

Defendant alleges that he informed counsel of the identity of several witnesses who could have provided exculpatory testimony. Among these witnesses was June Merrow, the mother of Christopher and Daniel Merrow, who witnessed the bicycle accident which, defendant contended, was responsible for the vaginal injuries to Lucy Guido. As we have discussed previously, the Merrow brothers' testimony was not cumulative of other testimony. Their testimony, which was developed at the hearing on defendant's motion for new trial, would have been the only eyewitness testimony to an accident which was only alluded to by other witnesses. In addition, June Merrow saw Lucy Guido immediately after the accident and could testify as to a tear in the crotch of Lucy's pants. This evidence, as we said in our discussion of defendant's first contention, was material and would have changed the quality, not just the quantity, of evidence on defendant's primary defensive theory. As such, it is at least arguable that defendant was effectively deprived of a substantial defense. See *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

We recognize that the failure to call witnesses may be seen as trial strategy and that ineffectiveness could be found for failure to interview those witnesses only if counsel was advised of potential witnesses and, by failing to interview the witnesses, counsel was ignorant of evidence that would have been of substantial benefit to the defense. See *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Johnson (After Remand)*, 125 Mich App 76, 81; 336 NW2d 7 (1983). However, the materiality of this evidence presented in the hearing on the motion for new trial, together with defendant's claim that counsel was made aware of this evidence, compels our conclusion that a remand is necessary to develop a record to determine what counsel knew of the witnesses and what they might say.

Accordingly, we direct the trial court on remand to conduct a hearing to determine whether counsel was effective. Any inquiry by the parties should be limited to defendant's claims of failure to interview witnesses who might have provided testimony that directly exculpated defendant of the CSC I offense.[2] The trial court shall make findings on any disputed fact issues at the hearing. This Court will address the merits of defendant's claim when it has received the record of the hearing.

We remand for proceedings consistent with this opinion. We retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] No hearing is necessary on defendant's contention that counsel was ineffective for waiving the right to an opening statement. The decision to waive an opening statement is a matter of trial strategy which rarely, if ever, is the basis of a successful claim of ineffective assistance of counsel. *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Moreover, defendant makes no argument, and the record does not reflect, that he was prejudiced by counsel's decision.

Similarly, we reject defendant's contention that counsel was ineffective because he did not obtain a psychological profile of defendant before trial. Decisions on what evidence to introduce are classic matters of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999); *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). We will not engage in hindsight in evaluating counsel's decision on this issue. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

We reject defendant's contention that counsel was ineffective for refusing to allow him to testify on his own behalf and for failing to communicate plea bargain offers. There is no evidence in the record supporting either claim. Moreover, there is no evidence that any plea bargain offers were made. Given that there is no evidence in the record that even arguably supports these claims, we will not review these issues further.

Finally, we conclude that defendant's contention that counsel was ineffective for failing to investigate claims about the victims' grandfather is without any support in the record. We decline to review this claim when the record does not even show that any such evidence existed.